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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 666

WILLIAM F. WORTHAM

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Wm. A. Porteous, Jr.
EDWIN H. GRACE,
Counsel for Petitioner.

American Printing Co., Ltd., 424 Camp Street

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The petitioner, William F. Wortham, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in affirming the conviction of petitioner of a conspiracy to defraud the United States.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 349) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 30, 1947. A petition for rehearing was filed (R. 355), and denied February 12, 1948. (R. 363)

The jurisdiction of this Court to review the decision herein, is invoked under Section 240(a) of the Judicial

Code, as amended by Act of February 13, 1925, appearing in Title 28 United States Code Annotated, Section 347. See also Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether a confession obtained by F.B.I. agents of a civil crime from an officer of the Navy through the aid of the Navy by issuance of Naval orders that the officer suspicioned report for questioning, and by such orders he was brought before the F.B.I. agents and instructed by a superior officer present that he was ordered there for questioning and would be questioned by those present, and was so questioned, admissible in a criminal trial where he is charged in the federal court, or is not such confession thereby rendered inadmissible under the rule of McNabb v. U. S. 318 U.S. 332, and inadmissible for the further reason as being obtained involuntarily, through compulsion and coercion.

2. If a co-defendant who has given a confession which was admitted over objection that it was obtained involuntarily, through compulsion and coercion, and such confession implicates both defendants on a charge of conspiracy, and such co-defendant does not appeal his conviction, is the other defendant thereby estopped to urge as prejudicial error on appeal as to him error in admission of such confession, and especially when such confession was, under the charge to the jury, evidence for the jury to consider as to the guilt of both defendants.

STATEMENT

Petitioner was convicted on a charge of having conspired with one Wilfred Andrew Lacour to defraud the United States in acting in the capacity of a Commander in the Navy, in the purchase of sporting equipment with funds of the United States, and in selling such equipment for his own use. (R. 2-15, 20-21)

During the trial a written confession of petitioner (R. 338-341), was offered in evidence over objection by counsel for petitioner on the grounds it was obtained involuntarily, through compulsion and coercion. (R. 293). The court heard evidence out of the presence of the jury on the objection, and which showed the following:

Petitioner was a Commander in the Navy; he had taken part in the invasion of Okinawa, and was returned to the United States by air to his home in Texas, and which was considered a recuperation leave. After he arrived home he received a telegram to proceed to New Orleans for temporary additional duty. He arrived in New Orleans and checked in at the Federal Building in New Orleans in accordance with his orders. He reported to a Captain Levy who was District Personal Officer, and orders were found that he was reporting for temporary additional duty. He was then instructed that he was to report at the Audubon Building in New Orleans. He was escorted to that building and to a conference room. In the room were two agents of the Federal Bureau of Investigation, a Lieutenant Commander and a Lieutenant of the Navy. A Captain of the

Navy, Captain Fly, a superior officer to petitioner, entered the room, and instructed petitioner as follows:

"You are ordered back for an investigation," and further said, "You will be asked questions by the different ones present." (R. 278)

That, as petitioner testified he was expected to answer, and in being interrupted by the prosecuting attorney as to make clear his position, said to the prosecuting attorney:

"I see you are a former service man; I don't believe at any time, that you failed to disregard your superior officer." (R. 279)

Petitioner testified, he did not volunteer any statement, but answered the questions because he considered he was under orders of a superior officer to do so.

Captain Fly left the room after the questioning of petitioner began, but he appointed a Lieutenant Snyder of the Navy who was there present, to conduct the interview. (See testimony of F.B.I. Agent Stedman (R. 270). And petitioner was asked by the prosecuting attorney, "Well, you knew, as a full commander, you didn't have to answer him, didn't you?" And petitioner replied "Absolutely," (R. 283). But, as to answering the Lieutenant, petitioner said:

> "But you must understand that Captain Fly —don't lose sight of the fact that Captain Fly convened this board of investigation, which was carried through until the minute we left the build-

ing; not when Captain Fly went to play golf." (R. 284)

Upon cross-examination petitioner continued to repeat that he considered he was under orders of a superior officer to answer the questions, and that was why he did so.

As to this, he said:

"A. I repeated that I don't know that those were his exact words; all I had was orders from the Bureau of Naval Personnel to proceed there for temporary duty, and I was turned over to Captain Fly to carry out the temporary duty orders." (R. 285)

And petitioner was questioned by the Court, and answered as follows:

"The Court:

And you made it, voluntarily. Did you or did you not?

The Witness:

Not wholly, no, sir. This signed statement was made, through my understanding that Captain Fly had ordered this board of investigation, and that I should carry out his wishes in making this statement." (R. 291)

Petitioner's testimony is found in the record beginning at page 277 and ending at page 292.

And in corroboration of petitioner's testimony that he

was under military orders to answer the question, F.B.I. Agent Stedman testified, as follows:

> "Q. Mr. Stedman, I wish you'd tell the Court exactly what took place, in the Audubon Building, in connection with this interview, at the time you went in there, and just what took place, as well as you can recall it.
>
> "A. As I recall it, we were all present with the exception of Captain Fly, of the Navy, and Mr. Wortham came in and Captain Fly stated to Commander Wortham that he had been brought here to answer some questions pertaining to his income tax, and that Lieutenant Snyder would conduct the interview; and Lieutenant Snyder then proceeded to interrogate the Commander."

And as proof of the fact that the statement of petitioner was not voluntary, F.B.I. Agent Jennings, testified that petitioner "was reluctant to admit." (R. 260)

Petitioner was not charged by the F.B.I. agents or the Navy before being questioned, nor was he advised of the charge about which he was to be questioned, or advised he could retain counsel, or advised by his superior officer that he could answer or refuse to answer, as he chose, but was instructed by such superior officer that he was ordered there for questioning.

Three confessions were also obtained from Wilfred Andrew Lacour, the co-defendant of petitioner. They were signed confessions (R. 325-337), and which implicated petitioner. They were offered in evidence and admitted in evidence over the objection that they were obtained invol-

untarily, and through corcion and compulsion. (R. 254). Petitioner urged on appeal that it was error of the trial court in admitting the confessions and as they implicated petitioner, and as the jury was instructed by the court that such confessions, formed a part of the whole body of the evidence before them (R. 314) and further charged the jury, as follows:

> "Therefore, the said four statements are to be considered by you as forming part of the evidence, and you may find from your consideration of the whole body of the evidence substantial other evidence, outside of these statements, which, with them, indicates to you beyond a reasonable doubt, that there was a union of minds between the two defendants, who made such statements, to commit an offense against the United States, that is to say, by conspiring together to defraud the United States." (R. 315)

and the admission thereof constituted prejudicial error to petitioner. But the Circuit Court of Appeals held that as petitioner's co-defendant did not appeal, the question as to the admissibility of his confessions in evidence was out of the case.

The confessions of petitioner's co-defendant were obtained by the following procedure:

The co-defendant Lacour, was, at the time of being questioned, an apprentice seaman in the Navy. An F.B.I. agent desired to question him about the crime of which he was later charged and convicted with petitioner, and the Provost Marshal of the base had Lacour brought to the

office under guard. Lacour was not then charged with any crime, and when brought to the Provost Marshal's office, a Lieutenant of the Navy told him he was brought there for an investigation (R. 238-240). Lacour, an apprentice seaman, testified, and as to be expected, that he was under orders to answer the questions. (R. 238-239). He considered that he had to answer the questions. (R. 239). He was then interrogated by the Lieutenant and the F.B.I. agent. The statement so obtained was reduced to writing and signed by Lacour. (R. 325).

Lacour was again questioned. On the second occasion, he was marched from the Naval Station to a car and taken to the Naval Intelligence Office. When he arrived there he was told by a Naval officer that he was there for an investigation. (R. 241-242) He did not volunteer any statement but answered the questions. (R. 242) Lieutenant McCormick testified that on the second occasion, he advised Lacour that he was conducting the investigation, (R. 211) and that Latour did not come voluntarily. (R. 211) And Navy Lieutenant Harlan who was also present advised Lacour he was to be further questioned. (R. 212) At the second interview F.B.I. agent Huiskamp testified, Lieutenant Harlan did most of the questioning of Lacour. (R. 194). The second statement is at page 329 of the record. Lacour was questioned a third time in New Orleans where he had been transferred. The Navy Department at New Orleans advised the F.B.I. that Lacour was available to them for questioning, (R. 223), and Lacour was brought under guard to the Naval Intelligence Office in the Audubon Building in New Orleans. Two F.B.I. agents and two Navy Lieutenants were in the office when Lacour was in custody of a guard

of the Navy. (R. 231) He was brought to the office for questioning. (R. 231) Lacour was there told he was to be questioned again by Lieutenant Snyder who largely conducted the interrogation. (R. 231) Lacour testified he answered all questions because he thought he had to. He did not volunteer any statement, and as he expressed it, "they had to pump it from me." (R. 243) He answered as he testified "Because they ordered me to." (R. 247) The third statement is at page 334 of the record.

As noted, with the Commander, a superior Naval Officer, a Captain, was used to order him to answer, and with his co-defendant, an apprentice seaman, lieutenants of the Navy were used. Superiors in both cases.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the judgment of conviction.

2. In holding that the confession of petitioner was admissible in evidence.

3. In holding that as Wilfred Andrew Lacour, a co-defendant, did not appeal his conviction, that whether his confession which was admitted in evidence over objection that it was obtained involuntarily, through duress and coercion, was out of the case and admission thereof could not be urged on appeal as prejudicial error by petitioner.

4. In not holding the admission in evidence of the confessions of petitioner's co-defendant were inadmissible, and the error in admitting them over objection, constituted reversible error as to petitioner.

5. In not reversing the conviction of petitioner.

REASONS FOR GRANTING THE WRIT

1. In holding the confession of petitioner admissible, the court below has decided a question of importance, and in a manner inconsistent with decisions of this Court, and contrary to civilized standards of procedure and evidence.

(a) The decision of the court below fails to follow the rule laid down in *McNabb v. United States, 318 U. S. 332*, and as followed in *Anderson v. U. S., 318 U. S. 350*, under which decision, the confession was rendered inadmissible for the following reasons:

The petitioner did not voluntarily appear for questioning, but was brought to the place of questioning by virtue of Naval orders. He was held under military restraint when questioned. He was not charged before being questioned, or advised of the charge about which he was to be questioned. He was not advised by his superior officer he could answer or not as he chose, but, on the contrary, specifically instructed by a superior officer that he was ordered there for questioning, and would be questioned by those present, and this superior officer appointed an officer to conduct the investigation. He was so questioned under such restraint and orders. The civil officers, F.B.I. agents, did not seek petitioner's arrest to charge him before a United States Commissioner, but, through the aid of a superior officer of the Navy compelled petitioner, an inferior officer, to submit to questioning to obtain a confession for use as evidence to convict him of the charge.

This Court, in *McNabb v. United States, 318 U. S. 332,* condemned a procedure of officers taking custody of those accused, and instead of taking them to the nearest United States Commissioner as required under the law, to take them to a place for questioning. Similar to the procedure followed by the F.B.I. in obtaining the confession from petitioner. As to such procedure, this Court in the *McNabb* case, said:

> "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. Congress has explicitly commanded that "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . . ." 18 USCA § 595. Similarly, the Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 USCA § 300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that "the person arrested shall be immediately taken before a committing officer." Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 USCA § 593, which

provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest. Similar legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states.

"The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process." (p. 341-343)

And further said:

"The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Finally, a conviction resting on evidence secured throughsuch a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law." (p. 345)

And, in concluding said:

"In holding that the petitioners' admissions were improperly received in evidence against

> them, and that having been based on this evidence their convictions cannot stand, we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by Federal courts in the trial of criminal cases. We are not concerned with la wenforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

The rule laid down in *McNabb v. United States, supra,* is, we submit, that a federal officer cannot hold an accused in custody, or, as was done with petitioner, cause him to be so held in custody, for the sole purpose of obtaining a confession from the person. The purpose of prohibiting such procedure, we believe, is to avoid exactly what took place in the instant case. The petitioner was not charged before being questioned. He was not advised that he was to be questioned about a crime he was accused of having committed. He was not advised by his superior officer that he could refuse to answer if he chose, but, on the contrary, instructed by his superior officer that he was ordered there to answer the questions, and would be questioned by those present.

We submit that the rule laid down in *McNabb v. United States, supra,* followed by the New Federal Rules

of Criminal Procedure, is intended to prohibit such procedure as followed herein. Under the circumstances, we submit, that the court below was in error in holding that the confession of petitioner was admissible, and such error requires a reversal of petitioner's conviction. *Malinski v. New York, 324 U. S. 401,* and cases therein cited.

(b) Even without the rule as laid down in *McNabb v. United States, 318 U. S. 332,* and followed in *Anderson v. United States, 318 U. S. 350,* the confession of petitioner was inadmissible as having been obtained involuntarily, and through compulsion and coercion. To be made voluntarily, (as the trial court held), it is required that the confession be "made freely, voluntarily, and without compulsion or inducement of any sort." *Bram v. United States, 168 U. S. 532,* quoting from Mr. Chief Justice Fuller, in *Wilson v. United States,* 162 U. S. 623. Under such test, the fact that petitioner was under Naval orders to report for questioning, and so instructed by a superior officer present, and also advised by his superior officer that he was to be questioned by those present, and advised that a named lieutenant would conduct the investigation. Under such restraint, and stress, petitioner did as ordered, answered the questions, and gave a full confession of his guilt. He was not a free agent to do or not as he saw fit, but under duress, compulsion and coercion to give the confession, which, as he testified he would not otherwise have given. Such compulsion constituted a violation of petitioner's rights under the Fifth Amendment, in compelling him to testify against himself. We submit that is a further reason why the lower court erred in holding the confession of petitioner admissible.

2. In holding that as the co-defendant of petitioner did not appeal his conviction, error urged by petitioner to the admissibility of his confessions which implicated petitioner, such question was out of the case, and could not be urged by petitioner, has decided a question of importance, and contrary to the interests of justice.

The confessions of petitioner's co-defendant implicated petitioner, and under the charge of the court to the jury was evidence to be considered by the jury. Yet, even though obtained involuntarily, and through compulsion and coercion, from petitioner's co-defendant, the court below holds that since petitioner's co-defendant did not appeal his conviction, the question cannot, under the decision below be raised by the appealing defendant, since the lower court holds that the question as to the admissibility of his confessions is out of the case. Such holding we submit is erroneous, and contrary to what we submit is the effect of the decision of this Court in *Anderson v. United States, 318 U. S. 350,* wherein this Court, under similar circumstances, said:

> "The Government urges that, even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Freed Long, whose credibility was under severe attack. The incriminating statement of each petitioner implicated all the others, including those who did not confess. To be sure, the trial court devised a procedure under which the confessions were introduced without mention of the

> names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners. So also, while the trial judge appeared to admit the confessions "only to be used against the persons who made them," his charge bound the jury to no such restricted use of the confessions. On the contrary, from what the trial judge told them the jury had every right to assume that in ascertaining the guilt or innocence of each defendant they could consider the whole proof made at the trial. There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as t othe others. Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside." (pp. 356, 357)

We submit the court below erred in not holding it was error of the trial court in admitting in evidence over objection the confessions of petitioner's co-defendant, and such error requires reversal of the petitioner's conviction.

CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

EDWIN H. GRACE,
Counsel for Petitioner.